b. Paragraph 1 of Rule 12 of the Supreme Court has been complied with, and the statement made thereunder is referred to for a concise statement of the grounds on which the jurisdiction of this Court is invoked.

c. STATEMENT OF THE CASE

A. The Decree to be Reviewed.

This appeal is from the final decree of a special District Court consisting of three judges under Section 380 of Title 28 of the United States Code Annotated (Judicial Code Section 266 Amended). That final decree restrained and enjoined the defendant officers (appellants here) (R. 224), from taking any steps or instituting any legal proceedings, civil or criminal to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

The material facts are not in dispute and are covered by a written agreed statement of facts (R. 110 *et. seq.*) In addition a few affidavits were introduced by each of the parties. (*R.* 95 *et. seq.*)

B. THE PARTIES

Appellee, The Texas Company, carries on and transacts as its principal business in the State of Alabama the storing and marketing of gasoline, kerosene, lubricating oils and other petroleum products. It has large investments in property and equipment in each of the sixty-seven (67) Counties in the State.

Appellants are the officials of the State of Alabama charged with the administration and enforcement of the gasoline excise tax statutes of said State.

C. THE CONTROVERSY

The Attorney General of Alabama on July 5th, 1935 rendered an official opinion to the President of the State Tax Commission, a copy of which is attached as Exhibit "H" to the Bill of Complaint (R. 59) and the effect of which is succinctly stated as a caption of said opinion:

> "The aggregate tax imposed by the several gasoline excise tax statutes is a privilege tax upon the storage, and consequent withdrawal from storage, of gasoline which tax accrues upon amount at the time of withdrawal from storage, and it is the mandatory duty of refiners, storers and distributors to compute and pay the tax as applicable to them on the basis of their withdrawals from storage. In com-

puting and paying the several amounts of tax due by them, distributors, refiners, retail dealers, and storers are not entitled to deduct from the basis of computation a number of gallons equal to the number of gallons of gasoline withdrawn from storage by them and sold to the United States Government in Alabama."

It was admitted that (R. 112) the officials representing the State Tax Commission, before the institution of this suit, informed the agents or attorneys of the Company that if the taxes imposed by the Alabama Gasoline Excise Tax Acts were not paid with respect to all gasoline withdrawn from storage in the State of Alabama and sold in said State to the U[illegible]tates, or to its departments or agencies, duri[illegible]g a period of the preceding five (5) years, that a suit or suits would be instituted to recover same; and further that (R. 113) the defendants, in their respective official capacities with the State of Alabama, intend to immediately follow the ruling of the Attorney General of Alabama dated July 5, 1935, and attached to the Bill of Complaint as Exhibit "H" and to collect or attempt to collect from those parties withdrawing from storage in Alabama gasoline and other liquid motor fuels and selling same to the United States, or its said departments or agencies, the taxes held under said opinion to be imposed on said parties on account of said transactions, unless said defendants are enjoined or restrained from doing so by judicial order or decree.

D. APPELLEE'S BUSINESS AND THE MANNER IN WHICH IT IS CONDUCTED.

For convenience we shall refer to appellee as the Company.

The largest single commodity dealt in by the Company in said state is gasoline, which is handled in the manner hereinafter stated (R. 111, 113 et seq).

The Company has never manufactured or refined any gasoline within the State of Alabama, and since prior to January 1, 1930 all of the gasoline which it has sold or withdrawn from storage in said State was manufactured or refined at its refinery located at Port Arthur, Texas, and then shipped by the Company in its boats or barges to its Terminals located either in the City of Mobile, Ala., or in the City of Pensacola, Florida, or in the Town of Millville, Florida. These terminals are located at or near the docks, and consist of storage tanks and other facilities for the direct unloading and reception of the gasoline as it comes to the Company's boats or barges from said refinery. After the gasoline is received at the terminals, it is shipped either by railroad in tank cars, or in boats to the bulk storage plants of the Company, or to the customers of the Company located principally in the States of Alabama, Florida, Georgia, Louisiana and Tennessee, except that the gasoline which is deposited or stored in the bulk storage plant of the Company located at Mobile, Alabama is transported by means of pipe lines connecting said terminal at Mobile with said Mobile bulk storage plant. The Company has now and has had during the past five (5) years thirty-six (36) bulk storage plants located in Alabama, which consist of

storage tanks and other facilities for keeping or storing the gasoline which is to be sold and distributed either through retail service stations or direct to its customers.

Since prior to January 1, 1930 Company has either owned, operated or has been interested in the operation of service stations at which gasoline is sold at retail to the public within the State of Alabama as follows:

A—*Company Operated Service Stations*, which are stations either owned or leased to the Company and are operated by salaried employees of the Company; the title to the gasoline handled through such stations remains in the Company until it is sold and delivered at retail to the Company's customers.

B—*Consignment Service Stations*, which are stations originally owned or leased to the Company and later leased or sub-leased by Company to individual operators. These stations are operated under contracts entered into between the Company and the operator of such stations, under the terms of which contracts all of the gasoline which is delivered by the Company into the tanks or other containers located on the premises of said stations, is owned by the Company until such gasoline is sold at retail to the customers who purchase same. The owners or operators of the Consignment Service Stations never acquire any interest in or title to said gasoline, but the title passes direct from the Company to the retail customer. Each owner or operator of such station is paid by the Company a commission on each gallon of gasoline of the Company sold or delivered through the station at which he is located.

C—*Independent Dealer Service Stations* are stations to which the Company makes deliveries of gasoline into the tanks or containers located on the premises of such station and the title to such gasoline at the time of such delivery passes from the Company to the owner or operator of such station and the owner or operator then sells and delivers the gasoline at retail to the public.

All of the three (3) classes of service stations above described consist of underground storage tanks and pumps connected therewith and other facilities for the storage and selling of gasoline at retail to the public. All of the gasoline which is deposited in the tanks or other containers is first withdrawn from bulk storage plant stations of the Company and transported by means of tank trucks or tank wagons from such bulk storage plants and delivered into the tanks or containers located on the retail service station premises.

During the period from January 1, 1930 through September 22, 1935 the Company withdrew from storage in Alabama and sold and delivered in said State to the United States, or its departments or agencies, 286,639.36 (Two Hundred Eighty-six Thousand Six Hundred Thirty-nine and Thirty six One hundredths) gallons of gasoline. The deliveries made, respectively from the terminal of the Company at Mobile, Alabama, from Company Bulk Staton Plants located in Alabama, from Company Operated Service Stations, from Company Consignment Service Stations and from Independent Dealer Service Stations were as follows:

Mobile Terminal	Bulk Station Plants	Company Operated Service Stations	Consignment Service Stations	Independent Dealer Service Stations
76221	174684	1240	13328	21166.36

A detailed schedule showing the amount of gasoline withdrawn from storage by the Company in Alabama and delivered in Alabama to the United States, or to its departments or agencies, during each calendar year from January 1, 1930 through September 22, 1935 appears as Exhibit "2" to the agreed statement of facts (R. 116, 128).

The gasoline delivered from the Terminal of the Company at Mobile, Alabama, amounting to Seventy-six Thousand Two Hundred Twenty-one (76,221) gallons was delivered F.O.B. railroad cars at Mobile, Alabama, consigned to the United States Army, Quartermaster Corps, Fort McClellan, Alabama. All of this gasoline had previously been shipped in boats or barges from Port Arthur, Texas to the Mobile Terminal and there deposited or stored in the tanks or containers of the Company at such terminal where it remained until it was withdrawn from storage into tank railroad cars on railroad tracks adjacent to said terminal. The title to said gasoline passed from the Company to the United States Army at the time it was loaded in said railroad tank cars at Mobile, Alabama. The sale and delivery of this gasoline to the United States Army was made under a previous contract which the Company had with the United States.

The One Hundred Seventy-four Thousand Six Hundred Eighty-four (174,684) gallons of gasoline above described as delivered from Bulk Plants in Alabama to the United States, or to the various depart-

ments or agencies of the United States, was gasoline which had been originally shipped from the Company's refinery at Port Arthur, Texas in boats or barges of the Company to the Company's Terminals located at either Mobile, Alabama; Pensacola, Florida; or Millville, Florida. After the gasoline arrived at these terminals it was loaded in railroad tank cars and shipped by railroad direct to the bulk stations in Alabama where it was unloaded and placed in tanks or containers in such bulk stations, except that the gasoline which was delivered from the Mobile Terminal to the Mobile Bulk Plant was transported by means of the aforesaid pipe lines. After the gasoline was delivered and stored in the Company's Bulk Plants in Alabama, it was not withdrawn from storage until placed in the Company's trucks or tank wagons, or in steel barrel containers, and delivered direct to the United States, or its departments or agencies, and the sole purpose of withdrawing such gasoline from the tanks or containers located in the Company's Bulk Plants was to make deliveries of such gasoline to the United States, or its said departments or agencies, under contracts which had previously been entered into between the Company and the United States, or its departments or agencies. In some instances where the gasoline was withdrawn from storage at the said bulk station plants and loaded on trucks or tank wagons, the tanks on such vehicles contained gasoline to be delivered to parties other than the United States, its departments or agencies.

The One Thousand Two Hundred Forty (1,240) gallons of gasoline above described as being delivered from Company Operated Service Stations and the

Thirteen Thousand Three Hundred Twenty-eight (13,328) gallons of gasoline above described as being delivered from Company Consignment Service Stations to the United States, or its departments or agencies, was gasoline which had originally been shipped by the Company's boats or barges from the Company refinery at Port Arthur, Texas, to the Company terminals at Mobile, Alabama; Pensacola, Florida, or Millville, Florida and after its arrival at such terminals it was loaded on railroad cars or in boats and shipped to the various Bulk Station Plants in Alabama where it was unloaded and stored in the Bulk Station Plant tanks or containers, except that the delivery from the Mobile Terminal to the Mobile Bulk Plant was made by pipe lines in the manner aforesaid. Thereafter, such gasoline was withdrawn from storage at such Bulk Plants and delivered in tank trucks or in tank wagons of the Company to the tanks or containers located on the respective premises of such Company Operated or Company Consignment Service Stations. The representatives or employees of the various United States departments or agencies obtained gasoline from such Service Stations by driving the automobiles, trucks or other vehicles belonging to, or being operated by, such departments or agencies into the Service Stations and requesting the Service Station attendants to fill the fuel tanks attached to such vehicles with the desired amount of gasoline. The Service Station attendants would then withdraw the gasoline from the tanks or containers located on said premises and place the desired quantities in the said fuel tanks. All of such purchasers of gasoline, before making such purchases, presented to the Service Station at-

tendants identification cards or other credentials, showing that they were entitled to purchase such gasoline for the United States, or its departments or agencies, and practically all of the gasoline sold and deliverd in this manner was delivered under previous contracts, which the Company had with the United States or its departments or agencies and the amount of gasoline so delivered would be charged to the United States, or the department or agency, for whose account it was delivered and at the end of each calendar month the United States, or its department or agency would, upon being billed for the gasoline so purchased, pay the purchase price of same to the Company.

The Twenty-one Thousand One Hundred Sixty-six and Thirty-six One Hundredths (21,166.36) gallons of gasoline above described as being delivered through Independent Dealers was handled in the same manner that the gasoline was handled through Company Operated and Company Consignment Stations until the gasoline was deposited into the tanks or containers located at the Independent Dealer Stations, at which time title to such gasoline passed to the owner or operator of such Independent Station. When an employee or representative from the United States, its department or agency, drove a vehicle into such Independent Dealer Station, upon his presenting identification card or other credentials showing that he was entitled to purchase gasoline for the United States, or such department or agency, the Independent Dealer would withdraw from storage and place into the fuel tank of such vehicle the desired number of gallons of gasoline and would take from such person a receipt, in duplicate, signed by such

person, showing the amount of gasoline so purchased and delivered, and when a truck driver employee of the Company would next make deliveries of gasoline to the Independent Dealer at his station in Company trucks from a Bulk Plant of the Company, such truck driver employee would deliver without charge to such Dealer an amount of gasoline equivalent to the gasoline previously delivered by the Independent Dealer to the employee or representative of the United States, or department or agency thereof. The truck driver would then deliver to the accounting department of the Company the receipts showing the amount delivered by the Independent Dealer to the employee or representative of the United States, or its department or agency, and the Independent Dealer would not be charged by the Company with the gasoline so delivered to replace the deliveries made by such Independent Dealer to the United States, its department or agency. The Independent Dealer would then be credited by the Company with the same margin of profit that he would have made if he had made a sale of such gasoline to third parties not connected with the United States. These deliveries were made on a credit basis under arrangements or contracts which the Company had with the United States, or the said departments or agencies, and at the end of each calendar month the Company would bill the department or agency for whose account the deliveries had been made through such Independent Stations and would attach to the bill so rendered one of the duplicate receipts signed by the employee or representative of the United States, or department or agency thereof, at the time such gasoline was sold and delivered and such bill would be paid to the Com-

pany in due course. All of the gasoline, which was originally delivered by the Company to the owner or operator of an Independent Dealer Station was billed or charged to such Independent owner or operator, but none of the gasoline which was delivered to such Independent Dealer or operator to replace the gasoline which has been previously delivered by such Independent Operator to the United States Government, or department or agency thereof, in the manner aforesaid was ever billed or charged to said operator. All of said deliveries so made by the Independent Dealers were made under arrangements between the Company and said operators and were made for the account of the Company under contracts which the Company had with the United States or its departments or agencies, and with the understanding that the Company would replace all gasoline so delivered in the manner aforesaid. The Company in its monthly reports to the State Tax Commission included in the amount of gasoline which was shown as delivered and sold to the United States or its departments or agencies during the preceding month the quantity of gasoline which had been handled through the Independent Service Stations in the manner above stated and delivered to the United States or its departments or agencies.

The Company has not paid any taxes with respect to storage and withdrawals from storage of gasoline sold to the United States or its departments or agencies, or with respect to sales of gasoline to such parties, since the decision in the Panhandle Oil Company case (R. 121, 125, 109) (Panhandle Oil Company v. State of Mississippi, ex rel. Knox, Atty. General, 277 U. S. 218.)

Gasoline is a highly volatile and inflammable liquid substance and it is necessary to keep same in closed metal tanks or containers..

A number of the agencies or departments of the United States purchasing gasoline in the State of Alabama are transacting the business of such agencies or departments in every county in the State of Alabama, but such agencies or departments do not have storage tanks or containers or other facilities for the storing of gasoline in all of such counties or at such points where gasoline may from time to time be needed by such agencies or departments. Due to the lack of such storage facilities, such departments or agencies purchase or otherwise obtain gasoline at such points where they have not storage facilities, from retail service stations or from other third parties which may be located at the point where such gasoline is needed or desired by such agencies or departments.

The Company has never stored gasoline in the State of Alabama for the account of other parties.

The terms of the statutes of the State of Alabama were of course agreed on, as were the opinions of the State Attorney General, the administrative practice of the State Tax Commission, and several contracts made by appellee company for the sale and delivery of gasoline to the United States or its departments or agencies.

Schedule 156 et seq. of the Revenue Act of 1935 was approved July 10, 1935, and became effective October 1, 1935.

The opinion of the Attorney General holding that appellee was liable for tax with respect to gasoline stored and withdrawn from storage in Alabama

and sold to the United States, was rendered July 5, 1935 (R. 59.)

The Bill of Complaint herein was filed September 24, 1935.

The contract with the Department of Interior of the United States was dated October 4, 1935, effective October 1, 1935 through June 30, 1936 (R. 214.)

The contract with the Treasury Department Procurement Division was dated September 27, 1935 effective October 1, 1935 through December 31, 1935 (R. 195).

d. SPECIFICATIONS OF THE ERRORS TO BE URGED

The appellants intend to rely upon the contentions that the specially constituted District Court erred:

1. In overruling the motion of defendants to dismiss the bill of complaint.

2. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State such persons or other parties insofar as said statutes

levy or impose excise taxes on the Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States or withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

3. In restraining and enjoining the defendants, and each of them, from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the bill of complaint levying or imposing excise taxes on persons or other parties withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of gasoline or other liquid motor fuels withdrawn from storage in said State by such persons or other parties insofar as said statutes levy or impose excise taxes on The Texas Company measured or determined by the quantity of gasoline or other liquid motor fuels withdrawn from storage, and which is sold and delivered to the United States by it or for its account under contracts between it and the United States.

4. In holding that the excise tax imposed by the statutes of the State of Alabama referred to in the bill of complaint is not a tax on the business of storage, but is only on the withdrawal from storage where such withdrawal is for use other than for sale.

5. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities is only required by

such statutes as to the gasoline which such person sells to pay a tax measured by the amount of the gasoline sold.

6. In holding that a person engaged in the business of selling gasoline and other liquid motor fuels, and engaged also in one or more of the businesses of distributing and storing or withdrawing from storage such commodities, is not required to pay a tax for the withdrawal from storage of the gasoline which such person sells.

7. In holding that as to gasoline which is sold, the tax is measured exclusively by the number of gallons sold.

8. In holding that the gasoline excise tax acts set forth or referred to in the bill of complaint are unconstitutional and void insofar as they impose an excise tax on account of or with respect to sales of gasoline to the United States measured by the number of gallons sold to the United States.

9. In holding that the necessary effect of the tax measured by the quantity of gasoline withdrawn from storage for sale and delivery to the United States would be to increase the price to the United States for such commodity by the amount of said tax, and that such tax burden would necessarily and directly fall on the United States.

10. In holding that the Constitution of the United States forbids the imposition of an excise tax on account of and with respect to gasoline withdrawn from storage for sale and delivery to the United States measured by the number of gallons so withdrawn from storage.

11. In holding that the plaintiff has no adequate remedy at law in the premises.

12. In not dismissing the plaintiff's bill of complaint.

SUMMARY OF THE ARGUMENT

I.

(a) The trial court was without jurisdiction to enjoin appellants from collecting the tax on past transactions, the only procedure contemplated being suits in which appellee would have its day in court and full advantage of any defenses it might have. (P. 19 infra)

(b) The trial court was without jurisdiction to enjoin the collection of the tax on future transactions because any such writ of injunction would necessarily be supervisory leaving the question to be decided in each case of whether the gasoline was purchased for use by the United States or its agency as instrumentality in the performance of a constitutional governmental function and because further the appellee had a complete and adequate remedy at law under the Statutes of Alabama. (P. 23 infra)

2.

The appellee, The Texas Company, is subject to a tax levied by the gasoline excise tax statute of the State of Alabama upon the privilege of storing gasoline within the State of Alabama, which tax accrues upon and is measured by the amount of gasoline withdrawn from such storage, irrespective of the sale or use to which it may be put after such withdrawal. (P. 33 infra)

3.

The gasoline excise tax levied by the statute of Alabama on the appellee, The Texas Company, being a tax upon the privilege of storing gasoline in Alabama measured by its withdrawal from storage, is not, with regard to purchase of gasoline in the State of Alabama by the United States Government, a tax upon the United States Government or its agencies, nor a tax which operates in such manner as to retard, impede or burden the exercise by the United States of its constitutional powers. (P. ....64.... infra)

ARGUMENT

1. The Jurisdiction of the Trial Court.

The question of jurisdiction of the District Court divides itself into substantially two questions, to-wit, the right to an injunction as to past transactions and the right to an injunction as to future transactions.

(a) Past Transactions.

It is shown by the Bill of Complaint, the Answer and the Agreed Statement of Facts that the State of Alabama is claiming certain taxes on gasoline which is claimed to have been stored and withdrawn from storage by the appellee in Alabama prior to this suit and which gasoline so stored and withdrawn from storage was sold to the United States or its agencies by appellee. A right of injunction to prevent the collection of these taxes is asserted, though entirely unsupported by any authority. It is denied in the answer that appellants have taken any steps other than to notify this appellee and the other oil companies that suit would be filed for the collection of these taxes. It is not shown that any action has been taken other than to have the legal question judi-

cially determined. There is nothing in the record showing any desire on the part of appellants to do other than have a court of law pass on the question. In any event, however, such action by the State against the appellee cannot hinder, retard or delay the United States in the performance of its constitutional functions. The gasoline has long since passed to the Government and whether appellee is liable for tax thereon is a question of law affecting appellee alone. The United States, having purchased the gasoline at a fixed price, is not concerned with appellee's liability for taxes to the State of Alabama.

While Circuit Judge Hutcheson in his dissenting opinion states that he does not understand the majority opinion to hold that an injunction is granted as to past transactions (R. 234), yet the decree of the court provides that the defendants be and they "hereby are restrained and enjoined from taking any steps or instituting any legal proceedings, civil or criminal, to execute or enforce the provisions of the statutes of the State of Alabama referred to in the Bill of Complaint levying or imposing excise taxes on persons or other parties selling, distributing or withdrawing from storage in the State of Alabama gasoline or other liquid motor fuels where the amount of such tax is measured or determined by the number of gallons of the gasoline or other liquid motor fuels sold, distributed or withdrawn from storage in said State by such persons or other parties in so far as said statutes levy or impose excise taxes on the Texas Company, measured or determined by the quantity of gasoline or other liquid motor fuels sold to the United States

or withdrawn from storage or which is sold and delivered to the United States by it or for its account under contracts between it and the United States." (R. 224.)

From the sweeping form of this decree, it would appear that the appellants are restrained from taking any action as to past transactions as well as future transactions.

It is respectfully submitted that injunction will not lie as to past transactions. Mr. High in his work on Injunctions Volume 1, 4th Edition, Section 491, page 456, declares:

> "Nor will equity restrain in the prosecution of a pending action at law instituted for the purpose of enforcing the collection of taxes upon grounds which may be raised as a defense to that proceeding. Nor will the collection of a tax be enjoined in any case when it is not shown that the injury resulting to its enforcement would be irreparable and this fact must distinctly appear by issuable averments."

Again in Section 23, page 38 of the same volume he states:

> "It (the writ of injunction) is not, therefore, an appropriate remedy to procure relief for past injuries and it is only to be used for the prevention of a future injury actually threatened and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages."

We call to the court's attention the cases cited by Circuit Judge Hutcheson on the right to restrain

a suit which has been or is to be brought on account of the invalidity of the claim, to wit, Cavanagh v. Looney, 248 U. S. 453, Boise v. Boise City, 213 U. S. 276, Northport v. Hartley, 283 U. S. 568, Champlin Rfg. Co. v. Commission, 286 U. S. 210, Yarnell v. Hillsborough, 70 Fed. (2nd) 435 and also Scottish Union & National Insurance Co. v. Bowland, 196 U. S. 611. In the latter case, this Court said:

> "If there is no personal liability for these taxes—a point which we do not feel called upon to decide—it is perfectly clear that if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law and there is no necessity to resort to a court of equity for relief. It will be presumed if the claim of the company is right, no personal judgment will be rendered against it and if its theory of the controversy is correct, no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction but leave the party to his defense at law."

The only method of collection threatened was by suit and appellee could interpose any defense that it might have to such suit.

It is respectfully submitted that appellees had no right to resort to equity as to the past transactions and that if the decree of the trial court enjoined the filing of a suit for the collection of taxes which had already accrued, such decree was in error.

It is respectfully submitted that the court was without authority to render any injunction as to

matters which had transpired prior to the filing of the bill in this case.

We therefore respectfully submit that in this proceeding the Court should limit its consideration to an interpretation of the 1935 Act (General Acts 1935—p. 508) and to appellee's right to an injunction as to future transactions and that any matters in the record relating to past transactions and former statutes can be considered only and to the extent that they shed light on or fix the proper construction of the 1935 Act.

(b) The right of injunction as to future transactions.

Judicial Code Section 267 U. S. C. A. Title 28, Section 384 declares: "Suits in Equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law." This statement crystalized into statute is but declaratory of the rule generally applying to injunctions and as long held by this court and is the rule in Alabama. It is submitted that under the laws of Alabama and the decisions of the highest court of the State, the appellee had an adequate remedy at law. Alabama Courts have long held that the right to pay the tax under protest and sue for it is an adequate remedy at law. In the early case of Alabama Gold Life Ins. Co. vs. Lott, Tax Collector, 54 Ala. 499, the Supreme Court of Alabama, after a lengthy discussion of the reasons underlying the policy of courts as not favoring injunction suits in tax matters (Pages 507, 508 and 509) concluded:

> "According to the principles embraced in the passages quoted above, complainant did not make out a proper case for the interposition of a court of Equity. The averments of irrepara-

ble mischief, multiplicity of suits and cloud upon title, though ingeniously framed, could be equally well made in any suit of the kind. All the difficulties and suggestions might have been avoided by paying the tax under protest; after which the money, if illegally exacted, could have been recovered back by an action at law without any serious injury, so far as the bill discloses, being inflicted on the company."

See also:

Allred vs. Dunn, Tax Collector, 207 Ala. 469, 93 So. 390;

Patterson vs. Pitts, Tax Collector, 180 Ala. 100, 60 So. 390;

Bower, Tax Collector, vs. Am. L. & Exp. Co., 195 Ala. 572, 71 So. 100;

Adams, Tax Collector, vs. Sou. R. Co., 176 Ala. 320, 58 So. 397;

Oates vs. Whitehead, Tax Collector, 173 Ala. 209; 55 So. 803;

City of Gadsden vs. American National Bank, 225 Ala. 490, 144 So. 93;

Ward, Tax Collector, vs. First National Bank of Hartford, 142 So. 93.

In addition, however, to the general remedy of suing the officer, the legislature of Alabama has, by at least three recent enactments, attempted to give a taxpayer full protection. We call to the court's attention the following Acts:

Act No. 549, approved September 9, 1927 (General Acts 1927, p. 635) provides as follows:

"Section 1. Whenever the amount or validity of any tax which may be levied against any tax payer or his property, whether the same be an ad valorem tax, privilege tax, franchise tax, or other tax, is in litigation, the tax payer may, pending such controversy or litigation, elect to pay the tax under protest and upon such election and the payment of such tax, the officer of the State or County receiving the same shall note on the receipt that said tax is paid under protest or pending litigation.

"Section 2. The payment of the tax as provided in Section 1 in this Act shall not affect the right to test and determine the validity or amount of said tax in any manner provided by law, and the proceeding to determine the validity of said tax shall proceed as if said tax had not been paid, but upon proof of payment of said tax before the court in which said action may be pending, the fact of payment shall be ascertained and recited in the judgment, and if the tax shall have been paid in full, no execution shall issue against the tax payer except for such costs as the tax payer may be liable for, and in the event it shall be determined and adjudged that the tax so paid was invalid in whole or in part or excessive in amount, the court hearing said proceeding shall so ascertain and determine, and by its judgment or decree shall fix the amount of the tax which was invalid, or which was excessive, and thereupon upon the presentation of a certified copy of the judgment to the State Auditor, it shall be the duty of the State Auditor to draw his warrant on the State

Treasurer in favor of such tax payer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the State, and such warrant of the State Auditor shall be payable out of any funds in the State Treasury not otherwise appropriated.

"Section 3. Upon the presentation of a certified copy of such judgment to the Board of Revenue, or other governing body of any County which may have received any part of said tax erroneously paid, as determined by the judgment, it shall be the duty of the said Board of Revenue or other governing body of the County to draw its warrant on the County Treasurer in favor of the tax payer for such amount of said tax as may have been erroneously paid to the County."

Again in 1931, the Legislature of Alabama passed another enactment, Act. No. 432, approved July 17, 1931 (General Acts, 1931, page 527). This Act provides:

"Section 1. That where any taxpayer in the payment of taxes or licenses which are paid directly to the State Tax Commission, and where by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the State Auditor is authorized to draw his warrant on the State Treasurer in favor of such taxpayer, and the State Treasurer is authorized to pay such warrant for the amount of such over-payment or erroneous payment.

"Section 2. Before any refund under this Section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the State Tax Commissioner setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within twelve months from the date of such payment.

"Section 3. The State Tax Commission shall examine said petition and the records of the State Tax Commission, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the State Tax Commissioner upon the evidence adduced is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the Auditor stating the amount to be refunded by the State, the particular fund on which such warrant shall be drawn and forward to the Auditor copy of the petition with the certificate attached, and if the Auditor shall be satisfied that the petition is in form required by law, he shall draw his warrant on the State Treasurer as hereinabove provided for the amount certified to him by the State Tax Commissioner.

"Section 4. This Act shall become effective upon approval by the Governor."

Apparently, the only objection which appellee has to this act is that it does not specifically provide for the payment of interest. It is, we respectfully submit, as simple a procedure to secure a refund of taxes illegally paid as could well be provided. We

have been unable to find any decision of this court or the Supreme Court of Alabama specifically holding that the failure to provide for the refund of interest denies a taxpayer an adequate remedy at law, although certain District Courts have so held. (Nutt vs. Ellerbe et al., 56 F (2nd) 1059) It is clear, however, that this statute affords a taxpayer a simple remedy for securing a refund of any amount which he actually erroneously over-paid.

The Legislature, by the General Revenue Act of 1935, Act No. 194, approved July 10, 1935 (General Acts 1935, page 256 et seq.), very carefully attempted to give a taxpayer, making an overpayment or a payment of taxes illegally exacted, adequate protection. In fact, we cannot but conclude that the statutes were written with the fixed purpose of removing the threat of injunctive process from the orderly administration of the tax statutes.

By Section 78, (page 294 of General Acts of 1935) appeals from property assessments are provided and specific machinery for refunds including the payment of interest thereon, are provided. By Section 103 (Page 307, General Acts of 1935), appeals from assesments made by the State Tax Commission and refunds of erroneous or excess payments with interest thereon are provided for. Section 379 of the same Act (General Acts, 1935, p. 568) provides:

> "Section 379. Whenever any taxpayer claims that any tax, except ad valorem taxes, herein levied, as fixed by the collecting officer is excessive or is invalid either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note

on the receipt that such tax was paid under protest. Within sixty days after such payment under protest, the taxpayer shall commence suit against the officer for the recovery of such amount as is claimed to be excessive or invalid, and unless such suit is commenced within such period of sixty days from such payment, such payment shall be deemed voluntary. Upon hearing and judgment the Court shall determine what amount so paid is excessive or illegal, and shall order the same to be repaid by the State or its agencies receiving the same in the same manner as is provided in cases of appeals from the State Tax Commission, and such amount shall be refunded in the same manner."

The Pertinent part of Section 103, to which Section 379 refers is as follows:

"If upon such appeal the assessment made by the State Tax Commission is reduced, the Court upon proof of payment of said tax shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment or decree, the amount of tax which was invalid or which was excessive both as to the amount paid to the State, counties, county boards of education, municipaliites or other governmental agencies receiving any part of such taxes, and upon presentation of a certified copy of the judgment to the State Comptroller, it shall be the duy of the State Comptroller to draw his warrant on the State Treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and

declare has been erroneously paid to the State, together with interest from date of payment, and such warrant of the State Comptroller shall be paid out of any funds in the State Treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the Court of County Commissioners or other governing body of any county, or upon presentation of a certified copy of such judgment to a county board of education, or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the State which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said court of County Commissioners or other governmental body of the County, or the County Board of Education of the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the Treasurer of such county, school board, municipality, or other agency in favor of the taxpayer for such amount of said tax as may have been erroneously paid to such County, School Board, municipality or other agency, together with interest from date of payment. Such amounts shall constitute claims preferred over all other claims and the respective treasurers are hereby required to refund such amounts received by said County, School Board, municipality or other agency."

This statute (Section 379) provides as full and complete a remedy as can be conceived. Appellant, in the court below, contended that the sixty-day provision contained therein would cause a multiplicity of suits. He argued further that the fact that the gasoline money was required to be distributed among the various counties would require the filing of suits against the sixty-seven counties. Under the statute above quoted, if it be a fact that the Treasurer of the State is required to distribute the portion of the tax appropriated to the counties, it would nevertheless be the duty of the counties, upon the case being adjudicated, to immediately refund that part of such tax received by the individual county. However, the Supreme Court of Alabama in *Jefferson County vs. Hard*, 227 Ala. 201, 149 So. 81, held the gasoline tax to be a State tax and not a county tax and held the amount distributed to the counties to be a mere appropriation out of the State Treasury. It is patent, we submit, that if any portion of the tax be paid under protest so as to "earmark" it specially to await judicial action, it would not be subject to distribution and the argument that appellant might have to sue sixty-seven counties is without merit. We respectfully submit that appellant's construction of these various statutes is distorted and fanciful. By pursuing the remedy afforded by the 1935 statute, appellant, on the bare possibility of having to file one or more additional suits to keep the statute of limitations from running, can recover any amount which is erroneously paid, with interest at the legal rate of 6%. Moreover, if it so desires, immediately upon the determination of the suit filed under the 1935 Statute, it can by the simple remedy of apply-

ing to the State Tax Commission under the 1931 Statute have any additional amounts refunded without further litigation. We respectfully submit that the policy of filing one or more additional suits to prevent the statute of limitations from running, pending the determination of a legal question is not such a multiplicity of suits as to authorize a remedy in equity. We submit that these statutes give plaintiff an adequate remedy at law and bring it within the decisions of this court in *Mathews vs. Rogers*, 284 U. S. 521, and *Stratton vs. St. L. & S. F. R. R. Co.*, 284 U. S. 530.

However, as Circuit Judge Hutcheson, in his dissenting opinion states:

> "Federal Equity Jurisdiction ought not to be exerted in this case because there is lacking here a substantial showing of a really threatened and irreparable injury calling for that jurisdiction."

This injunction, as pointed out by Circuit Judge Hutcheson, is in its nature supervisory. For a supervisory injunction to issue under any circumstances it is, we submit, necessary for the appellee to prove that the tax statute *properly* construed not only hinders, delays and retards the United States in the performance of its constitutional functions, but also that any agency, because of which immunity is asserted is engaged strictly in performing constitutional governmental functions, and that the gasoline purchased by such agency is so used.

We submit that the principles laid down in the cases of *South Carolina vs. United States*, 199 U. S. 437; *Ohio vs. Helvering* 292 U. S. 360 and *Helvering*

vs. Powers, 293 U. S. 214, apply with equal force and significance to the Federal Government so far as the State power of taxation is concerned, when the government through its numerous agencies, corporate and otherwise, engages in functions other than governmental.

We may, we submit, with propriety point out that immunity is claimed on account of sales made to the Department of Agriculture (R. 128). While nothing is shown as to the uses to which such gasoline was applied, it is a fair assumption that a portion of that heretofore sold to the Department of Agriculture was for the Agricultural Adjustment Administration, an activity of the Government held beyond its constitutional powers in United States v. Butler, 80 L. ed. p. 287 (Adv. Sheets No. 5).

2. Meaning and construction of the gasoline excise tax act of Alabama as applied to appellee, The Texas Company.

THE APPELLEE, THE TEXAS COMPANY, IS SUBJECT TO A TAX LEVIED BY THE GASOLINE EXCISE TAX STATUTE OF THE STATE OF ALABAMA UPON THE PRIVILEGE OF STORING GASOLINE WITHIN THE STATE OF ALABAMA, WHICH TAX ACCRUES UPON AND IS MEASURED BY THE AMOUNT OF GASOLINE WITHDRAWN FROM SUCH STORAGE, IRRESPECTIVE OF THE SALE OR USE TO WHICH IT MAY BE PUT AFTER SUCH WITHDRAWAL.

Before the constitutionality of the gasoline excise tax acts of the State of Alabama, or the constitutionality of the method of enforcement and ad-

ministration of those acts can be passed upon, the acts themselves must first be examined and their meaning and construction determined on. The bill of complaint refers (R. 2, 10) to some seven separate legislative enactments officially published in General Acts of Alabama, 1923 page 36; 1927 page 326; 1927 page 16; 1931 page 859; 1932 page 314; also an Act approved January 31, 1935 (Acts 1935, page 30) and an Act approved July 10th, 1935 (Acts 1935, page 508).

The verbiage of these several acts is similar, but the majority opinion of the Trial Court is inaccurate when it states that the several acts "contain the same verbiage so the construction of one applies to all". (R. 228). In some material respects the acts differ. For example, the majority opinion of the Trial Court refers to Section 3 of the Act of 1927 amending the Act of 1923 (General Acts of Alabama, 1927, page 326) (R. 227).

> "Section 3 of the Act provides:
>
> 'every distributor, retail dealer or storer of gasoline as herein defined shall pay an excise tax of two cents per gallon upon the *selling*, distributing or withdrawing from storage for any use gasoline as herein defined in this State.'
>
> "Here the tax is to be paid, not on the storage but on the sale, distribution or withdrawal from storage."

Again recognizing the significance attached by the majority to their conception that the statute failed to impose a tax on the storage, there later appears in their opinion the following (R. 229):

"In each instance the tax is 'measured by' the number of gallons sold, distributed or withdrawn. It nowhere imposes a tax on storage alone".

Would the majority have been of the same opinion if they had given due weight to the fact that the Act now in force, approved July 10th, 1935, adds to the language of the 1927 Act (Acts 1927, page 326) explicit words to show that storage was intended to be taxed? (R. 45) (Gen. Acts of Ala., 1935, page 508)

"Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, *storing or* withdrawing from storage in this State for any use, gasoline as herein defined." (Emphasis ours).

The words "storing or" did not appear in the 1927 Act construed in the majority opinion. It is, therefore, important at the outset to determine which of the several Acts is now operative, and with which of those Acts this Court is concerned.

The bill alleges and the answer admits that the several gasoline excise tax acts were superseded by the General Revenue Act of Alabama approved July 10th, 1935, which in effect consolidates the levies and imposes "an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline". (R. 10). Of the Acts referred to in the bill, that act alone is now in force and effect and has a prospective operation, and therefore it is the statute, the enforcement and executive of which is sought to be re-

strained. The first three sections of that act define its nature, the remainder of the statute being dedevoted to procedure. We, therefore, quote the first three sections of the act approved July 10, 1935, and now in force:

"SCHEDULE 156. As used in this Chapter, the term 'gasoline' shall include gasoline, naphtha and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this Chapter shall be held to apply to those products known commercially as 'kerosene oil', 'fuel oil' or 'crude oil' commonly used for lighting, heating or industrial purposes. The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, municipal corporations, school boards or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural. The term 'distributor' shall include any person who engages in the selling of gasoline in this State by wholesole domestic trade, but shall not apply to any transaction of such distributor in interstate commerce. The word 'refiner' shall include any person who manufactures, distills, blends, compounds or mixes any one or more products in the production of a liquid motor fuel as herein defined. The term 'retail dealer' shall include any person herein defined as distributor who is also engaged in the selling of gasoline in this State at any place in this State in broken quantities. The term 'storer' as herein used shall include any person who ships or causes to be shipped or re-

ceives gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose.

"SCHEDULE 156.1. Every distributor, refiner, retail dealer or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline as herein defined, provided, however, that this excise tax shall not be levied on the sale of gasoline in interstate commerce, and provided further that where the excise tax of six cents ($0.06) per gallon upon the sale, distribution, storage or withdrawal from storage of such gasoline shall have been paid by a distributor, refiner, or by retail dealer or storer, such payment shall be sufficient, the intention being that the tax shall be paid but once.

"SCHEDULE 156.2. The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sale or for other use; provided, that 'sellers' of gasoline and its substitute paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and refiners, storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

Under the proper meaning and construction of that Act is the tax laid upon every storer of gaso-

line, or is a storer who is also a seller of the same gasoline exempt from the storage tax and subject only to a sales tax? The majority opinion held the latter construction and arrived at the following definition of a storer:

> "So a storer is one who stores for his own use and not for the purpose of sale, and the tax is levied only where he withdraws the gasoline for his own use."

We respectfully submit that this conception of a storer is refuted by the explicit terms of the statute itself. There, by Schedule 156.1, the tax is imposed upon "every *storer*, storing or withdrawing from storage *for any use*". Schedule 156 defines "storer":

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same *for any purpose.*" (Emphasis ours).

Schedule 156.2 provides in part:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage, *whether such withdrawals be for sale or other use.*" (Emphasis ours).

The construction of the act as to who is a storer by the majority opinion is not only refuted by the language of the statute itself, but is not founded upon a single previous decision. The correct construc-

tion, we respectfully submit, is well pointed out by Circuit Judge Hutcheson in his dissenting opinion.

> "My difference with the majority is fundamental. They think the tax is on the sale. With respect, I submit that it is not. That statute which lays this tax lays it on plaintiff as a storer in the State. It becomes payable by it when the gasoline is withdrawn for ultimate use by the storer, whether that use is to consume it or to part with title and possession of it by sale or otherwise. The Supreme Court of Alabama once (State v. City of Montgomery 228 Ala. 93, 151 So. 856,) and the Fifth Circuit Court of Appeals twice (Pan American Pet. Corp. v. State of Alabama, 67 Fed. (2nd) 590, Certiorari denied 291 U. S. 670, Ervin & Stevens v. State of Ala., et al (Ms.) decided Nov. 22, 1935) has so declared. No contrary opinion has been called to my attention."

The substantial facts involved in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, were that the City of Montgomery purchased gasoline without the State, receiving it in tank cars and storing it in its own storage tanks and thereafter withdrawing the gasoline therefrom for use in Municipal purposes. The question presented involved the nature of the tax and whether the City was liable therefor. The Court was necessarily required to determine the acts made the subject of the tax. After reciting the legislative history of the acts, the court *held that the several acts imposed a tax upon the storage measured by the amount withdrawn from storage.* In classifying such a tax as an excise tax rather than a property tax, the Court said:

"There is a clear distinction between (1) an excise tax upon the business, occupation, or privilege of owning, storing and withdrawing gasoline, imposed not only for revenue but also *because it is a dangerous explosive, and within the police power of the state*, and (2) a tax upon the separate acts of the owner in taking this property out of storage for his own use; for this is a property tax. This distinction is clearly defined in Dawson v. Kentucky Dist. Co., 255 U. S. 288, 41 S. Ct. 272, 65 L. ed. 638." (Emphasis ours).

The Alabama Supreme Court further used the following language:

"The acts in question impose a tax upon a storer as well as a distributor or retail dealer. We think this is true though it is not due until it is withdrawn from storage, and is measured by the amount so withdrawn rather than the amount placed in storage. True, it may leak out, waste out of storage, or explode, and thereby and to that extent no tax is payable; *but the whole of the acts taken together show, we think, that the purpose is to impose the tax on the storage, though measured by the amount withdrawn, and then it becomes due to be paid.*

"*Since the privilege of storing is made the basis of the tax, and for that purpose an excise tax may be levied*, it is not controlled by Section 91 of the Constitution (exempting municipal property from property or ad valorem taxes) *and it is immaterial to what use it is put after it is withdrawn from storage.*" (Emphasis ours).

This is a clear construction of the statutes in this regard and was necessary to the proper disposition of the questions before the Court. The fact that the Court further held the tax did not apply to the City on the sole theory that the cities of the State not having been expressly included in the provisions of the statutes were deemed exempt, in no way detracts from its decision on the other question.

The Court, after giving the foregoing construction of the statute, addressed itself to the question of the intention of the legislature and decided that, in the absence of an expressed inclusion of municipalities, there was no intention to tax. It inter alia stated:

> "There is no infringement of this principle to hold that when a city buys gasoline from a dealer who is subject to the tax, the amount of it should not be deducted. The tax is imposed on the dealer and not on the city in that transaction, though it incidentally is paid in the amount of the purchase price. Orange State Oil Co. v. Amos, 100 Fla. 884, 130 So. 707."

This clearly shows that the Court considered the tax to be levied on the original storer and, even though afterward purchased by a state governmental agency, that the dealer could not claim any immunity therefor; that the only way in which a city or even the State of Alabama could use the gasoline without the payment of the tax was by importing it and storing it itself.

In this connection it may be noted that the State Tax Commission has uniformly collected the excise tax with respect to all gasoline stored or withdrawn

from storage in Alabama for sales to the State or to counties, municipalities or other political subdivisions of the State without allowing any deduction on account of such sales or without any claim having been made for such deduction. (R. 108).

It is most significant that the Alabama statute of 1935 now before the Court was adopted after, and with regard to, the construction placed upon the prior acts in State v. City of Montgomery, supra, and uses even stronger language than that which the Court held in that case constituted a *tax upon the privilege of storing gasoline*, which accrued and was to be measured by the *amount withdrawn from storage.* The face of the 1935 Act shows that the legislature particularly had in mind the City of Montgomery decision in that municipal corporations held exempt from the tax by that decision were expressly included in the provisions of the new Act, (Schedule 156) reading in pertinent part:

> "The word 'person' means and includes persons, corporations, co-partnerships, companies, counties, *municipal corporations*, school boards or agencies of the State, or other agencies, associations, incorporated or otherwise singular or plural." (Emphasis ours).

The language of the previous gasoline excise tax acts had also been construed by the Court of Appeals for the Fifth Circuit in Pan American Petroleum Corp. v. State of Alabama, 67 F. (2nd) 590 (Certiorari denied 291 U. S. 670, 78 L. ed. 1060, 54 S.C.R. 454), as constituting a tax not on sales, but upon storage and withdrawal from storage in the State. In that case the Oil Company had stored gasoline in the

State of Alabama in bulk plants and withdrawn the particular gasoline in question from storage in Alabama and delivered it by the company's tank trucks and containers to Post Exchanges located upon United States Government Military Reservations at Camp McClellan and Maxwell Field. The territory embraced in these military reservations had been acquired by the United States by purchase and jurisdiction over them had been ceded to the United States by the State of Alabama in due form. The question was whether the Oil Company was liable for the excise tax with regard to its action in storing such gasoline and withdrawing the same from storage and delivering the same to such Post Exchanges located within the territory or confines of such military reservations. The Oil Company denied liability for the tax upon two grounds, (1), that the tax did not accrue or apply except upon the actual sale and delivery of the gasoline, which sale and delivery was actually consummated at a place over which the State of Alabama had no jurisdiction and therefore the tax did not apply, and (2) that the Post Exchanges were instruments or agencies of the United States Government. The Court, in an opinion written by Judge Bryan, held that the tax levied by the Alabama statutes definitely accrued upon the withdrawal of the gasoline from storage, and having accrued before actual delivery it was not material whether the gasoline was actually delivered technically within the State of Alabama, or upon territory over which the State of Alabama had no jurisdiction. In this connection the Court used the following pertinent language:

"That a State has the power to levy an excise tax upon the withdrawal of gasoline from storage, regardless of the use to which it is put, and even though it be consumed in the generation of motive power for carrying on interstate commerce, is settled by the decision of the Supreme Court in Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Court, 591, 77 L. ed. 1155."

In this decision the Court was very careful to distinguish the tax levied by the Alabama statutes from taxes on sales levied by the statutes of other states. The defendant in that proceeding relied strongly on the decision in Pan-Handle Oil Company v. State of Mississippi, 277 U. S. 218, 48 Sup. Ct. 451, 72 L. ed. 857, and the Court in distinguishing the Alabama tax from the sales tax which was before the Court in the Panhandle decision, said:

"It is to be conceded that an excise tax on the sale of gasoline is inoperative as to sales made to the United States, either directly or indirectly, through one of its departments, for government use, Panhandle Oil Co. v. State of Mississippi (citation above.) There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to the instrumentalities of the Government, for then also the United States would have been the real purchaser. BUT THE TAX HERE IS NOT ON THE SALE BUT IS ON THE WITHDRAWAL OF THE GASOLINE." (Emphasis ours).

The fact that the Court then also held that the Post Exchanges were not instrumentalities of the United States Government cannot be said to detract from its careful construction of the Alabama statutes, because it clearly appears that in the question before the Court the character of the tax and the basis upon which it was levied were of greater importance than the character of the person or agencies which purchased the gasoline.

In the case of Ervin and Stevens v. State of Alabama, et al 80 Fed (2nd) 432, decided November 22nd, 1935, the question was whether a railroad company owed the State of Alabama for taxes as a storer of gasoline. The company transported into the State in tank cars gasoline which it kept in Alabama for its own use. The Court held that it was liable for the tax, and, of the nature of the tax, said:

> "It has been decided that the tax is a valid excise upon the storage of gasoline measured by the withdrawals. State v. City of Montgomery, 228 Ala. 93; Pan American Petroleum Corporation vs. State of Alabama, 67 Fed. (2d) 590. c/f Foster and Creighton v. Graham, 285 S. W. 570; N. C. & St. L. v. Wallace, 288 U. S. 249; Edelman v. Boeing Air Transport, 289 U. S. 249." * * * * * * * * *
>
> "The tax in question was not intended to be, it is not, a property tax. It is an excise. It falls not upon the gasoline, but upon the act of withdrawing it from storage. It is due by one who stores and withdraws because of the act of withdrawal. If one is a storer within the

meaning of the statute, that is, if he brings gasoline into the State in tank quantities for storage and withdraws it, the tax is due by him on the withdrawals of that gasoline, whether it is stored in the State in tanks or is stored there in small receptacles."

The language used in the Alabama statutes was taken almost literally from the gasoline excise tax levied by the laws of Tennessee of 1925, and as subsequently amended. These statutes of Tennessee contained, as does every statute of the State of Alabama enacted since 1927, the express legislative declaration that "the tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors, storing any of the products mentioned in this act, and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use." These statutes of Tennessee were presented to the Supreme Court of the United States in Nashville C. & St. L. Ry. v. Wallace 288 U. S. 249, 53 Sup. Ct. 345. In construing the character of the tax levied and the basis upon which it operated, the Court said:

"Storage of the gasoline and withdrawal of it from storage within the State for use *or sale* are, as the State's Supreme Court has held, the events which, by the very terms of the statute, call it into operation. * * * "

"The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. * * * Here the tax is imposed on the successive exercise of two of these powers,

the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins." (Emphasis ours).

This decision involved interstate commerce and not a withdrawal from storage and sale of gasoline to the United States Government. It is submitted, however, that this is a clear recognition by this Court that the Tennessee statute meant just what the legislative declaration said it did—that the tax was a tax upon the storage and withdrawal from storage of gasoline within the State and not otherwise. In this regard the statutes of Tennessee are identical with the statutes of Alabama here involved.

The same construction in this regard was given to the same Tennessee statutes in American Airways v. Wallace, 57 Fed. (2nd) 877, by a special statutory three-judge court in denying an injunction against the collection of the taxes levied by the Tennessee statutes, insofar as they applied to the transactions by the plaintiff with respect to gasoline which it had purchased in interstate commerce, stored in tanks on its own property at its airports, and withdrawn from storage exclusively for fueling planes carrying United States mail, freight and passengers in interstate commerce.

Likewise, the Supreme Court of the State of Tennessee had construed the same Tennessee statute in Foster & Creighton Co. v. Graham, 154 Tenn. 412; 285 S. W. 570; 47 A. L. R. 976. The opinion states:

"We think the act, when properly interpreted, not only applies to distributors and dealers in gasoline, but applies to consumers

who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, *whether such withdrawal be for sale or other use.* It, therefore, necessarily follows that complainant, and all other persons, etc., in like situations, come within the provisions of said act." (Emphasis ours).

In that case the question was not involved of whether one in appellee's position, who is a storer of gasoline and also a distributor and retail dealer, should pay a tax on storage or a tax on sales. The plaintiff in that case had never been a distributor or dealer in gasoline, nor had it engaged in the business of storing the same for any other purpose than its own use. The contention was that the Act did not impose the tax upon one who is not a dealer or distributor, but only stores gasoline in its own tank and withdraws the same for its own use. The Court decided against that contention, and clearly and specifically held that the tax was upon the storage of the gasoline. The basis for imposing such a tax as an excise rather than a property tax was stated by the Court in language which makes clear the reason and theory upon which a tax on the storage of gasoline is based:

"The argument is that the right to store gasoline in quantity is a natural right, but this argument is not sound.

"If this argument were correct, upon the same principle one would have the right to store dynamite or gunpowder though the storing of dynamite or gunpowder might affect the health

> or safety of the public. The storing of these commodities is certainly not a natural right. Gasoline is likewise an intrinsically dangerous substance. It follows, therefore, that the State has the right to control the use of it as well as the sale of it. There cannot be any natural right to handle and use it without restraint. One method of regulation is by means of a privilege tax. One of the necessary effects of such tax is to remove the motive for storing it in quantity, because, if the tax of three cents a gallon cannot be saved, it is reasonable to assume that the consumer would buy it from the distributor as needed."

In passing we may notice that the Alabama Supreme Court in the case of State of Alabama v. City of Montgomery, 228 Ala. 93, 151 So. 856, adopted the same reasoning and called attention that an excise tax might be laid upon the privilege of storing and withdrawing gasoline not only for revenue, but "also because it is a dangerous explosive and within the police power of the State."

The decision of the Tennessee Supreme Court in the case of Foster & Creighton Co. v. Graham, supra, is in line with the decision of the Alabama Supreme Court in the case of State of Alabama v. City of Montgomery, supra, and with the two decisions of the Fifth Circuit Court of Appeals in Pan American Petroleum Corp. v. State of Alabama, 67 Fed. (2nd) 590, and Ervin & Stevens v. State of Alabama 80 Fed (2nd) 432, decided November 22nd, 1935, and with the decision of the United States Supreme Court in the case of Nashville C. & St. L. Ry. v. Wallace, supra, and of the special statutory three-judge

Federal Court in the case of American Airways v. Wallace, supra, to the effect that the tax levied by the gasoline excise tax statute is a tax upon the privilege of storing gasoline, which tax is measured by the amount of gasoline withdrawn from storage "for any purpose", and "whether such withdrawals be for sale or other use".

That the separate acts of a person in storing gasoline and withdrawing it from storage are proper independent subjects of state taxation and properly within the taxing power of the State, irrespective of a subsequent and immediately connected use, is further recognized by the Supreme Court of the United States in Edelman v. Boeing Air Transport, 289 U. S. 249, 53 Sup. Court 591, 77 L. ed. 1155. In that case it appeared that the Transport Company purchased outside of the State of Wyoming and brought into the State in interstate commerce certain gasoline which was stored in fuel tanks at its airports and which was thereafter withdrawn from those tanks exclusively for the purpose of filling the tanks of its airplanes used only in interstate commerce. The statutes of Wyoming applied, among other things, to any person "using" gasoline within the State. This Court held that while the "use" of the gasoline in furnishing motive power for the operation of the planes engaged in interstate commerce was beyond the power of taxation, that nevertheless the "use" to which the gasoline was put in *withdrawing it from tanks and placing it in the fuel tank of the plane so used*, although a necessary antecedent to the actual use of the gasoline in interstate commerce, *was* within the power of taxation enjoyed by the State of Wyoming as a legally sep-

arate act. Touching the power of the State to tax these separate antecedent acts, the Court used the following language:

> "A State may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in No. 176, Nashville C. & St. L. R. Co. v. Wallace, supra. There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any right or power incident to . . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U. S. 245, 73 L. ed. 683, 49 S. Ct. 279.' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations."

If we properly interpret the majority opinion written by Judge Ervin (R. 226 et. seq.) it holds that the Alabama Gasoline Tax Statutes, including the 1935 Act, levy what is in nature and substance a sales tax as to all gasoline sold or which is stored and withdrawn from storage and sold and levies a storage tax on that amount stored and withdrawn from storage for *use*. In other words, Judge Ervin

concludes that the tax is a license tax on the dealer, distributor or storer, the amount of which license is determined according to the manner in which such person may engage in business. If engaged in the business of selling, his license is measured by his sales. If engaged in the business of storing and withdrawing from storage for his own use, his tax is measured by the withdrawals. Judge Ervin's decision holds the tax on storers to be a tax on *the use of the gasoline* for the storers own purposes, and as to all other withdrawals the tax is a tax on the dealer, distributor or storer, measured by his sales.

Such an interpretation we respectfully submit cannot be afforded the statutes in view of the decisions in the cases of State vs. City of Montgomery, supra, Pan American Petroleum Corp. vs. State, supra, and Ervin & Stevens, Receivers, etc. vs. the State, supra.

In the case of the State vs. City of Montgomery, the Supreme Court of Alabama was very careful to sustain the tax as an excise on the storage of gasoline for the reason that it is an inflammable product and carefully indicated that a tax on the mere storage and withdrawal of a product generally, to be used for one's own purposes would be a property tax (citing Dawson vs. Kentucky Distilling Co.).

Judge Ervin, apparently ignoring the decision of the Alabama Supreme Court defining the statute and by which definition we respectfully submit he was bound, construed the statute, so far as the storage features of the tax are concerned, to be a tax on the use of the gasoline by the storer.

While it is true that certain states have upheld excises on the use of gasoline and the same have

been sustained by this Court (Edelman vs. Boeing Air Transp. 289 U. S. 252) yet the Supreme Court of Alabama refused to so denominate the tax, in effect holding that if such were the nature of the tax, it would be a property tax and violative of the State Constitution, the rate being in excess of the constitutional maximum for property taxes.

It is therefore respectfully submitted that Judge Ervin's interpretation of the storage feature cannot be sustained, it being contrary to and contradictory of the interpretation placed on the statute by the highest court of the State of Alabama whose decision as to the meaning of a local law controls both the district court and this court.

> "'As to questions depending upon construction of state laws, the decision of the state court is controlling on writ of error to it, and this even though a similar provision of a State statute has been differently construed by the Federal Court.'"
>
> "Detroit & M. Railway Co. v. Fletcher Paper Co., 39 Supreme Court 13, 248 U. S. 30, affirming Fletcher Paper Co. vs. Detroit & M. Railway Co., 198 Mich. 469.
>
> "'The construction of a State statute made by the highest State court insofar as it determines the meaning of the statute, is binding upon the Federal Supreme Court.'
>
> "American Manufacturing Co. vs. City of St. Louis, 39 Supreme Court Reporter 522, 250 U. S. 459.
>
> "'The Supreme Court must accept the decision of the highest State court fixing the

meaning of state legislation, as though such meaning has been specifically expressed therein.'

"Supreme Lodge, Knights of Pythias vs. Meyer, 44 Supreme Court Reporter, 432, 265 U. S. 30.

"Federal Courts must follow State Supreme Courts' interpretation of State statutes.

"3rd Decennial Digest, Courts, Section 366-1, 2nd Decennial Digest, Courts, Section 366-1,

Kansas City, Memphis & Birmingham Ry. Co. v. Stiles, 37 Sup. Ct. 48."

Further, the interpretation given to the statute by Judge Erwin is likewise directly opposed to the decision in the case of Pan-American Petroleum Corp. vs. State, 67 Fed. (2nd) 590 (Certiorari denied 291 U. S. 670, 78 L. ed. 1060, 54 S. C. R. 454).

This case is illuminating not only because of the rule of law laid down which we quoted just above but because of the facts upon which the decision was predicated. A careful analysis of the facts will disclose an irreconcilable conflict between the decision in the Pan-American case as based on the interpretation of the statute therein and the result which would have been arrived at, had Judge Ervin's interpretation been applied to the facts.

May we briefly summarize: In the Pan-American Case (1) the gasoline was stored and withdrawn from storage in the City of Montgomery. (2) The gasoline was sold upon a government reservation to which the State of Alabama had relinquished all jurisdiction (Code 1923 Section 1505) except

the right to serve legal process. This cession, of course, included the power of taxation and if the tax were on the sale, the sale transpiring on territory over which the state had no jurisdiction it follows that no tax would have accrued and the Company would have been entitled to judgment.

The Circuit Court of Appeals for the Fifth Circuit following the decision of the Supreme Court of Alabama in State vs. City of Montgomery refused to accept this interpretation and held the tax to be a tax on storage measured by the amount withdrawn from storage and such withdrawal having taken place within the jurisdiction of the State of Alabama the tax accrued and the fact that thereafter the gasoline was sold and delivered on a government reservation over which the State had no jurisdiction could not affect the Company's liability for the tax.

It is patent we respectfully submit that if Judge Ervin's interpretation be correct that where gasoline is sold the tax is on the sale an opposite decision from that reached by the Circuit Court of Appeals would have been necessary because the tax being on the sale and the sale taking place at a point over which the State of Alabama had no taxing power, no tax could have been imposed.

> Standard Oil Company of California v. California 291 U S., 242 (decided one week from the denial of certiorari in the Pan-American Petroleum case).

The same interpretation as given in the State vs. City of Montgomery and the Pan-American Petroleum Corp. cases was reaffirmed by the Circuit

Court of Appeals Fifth Circuit in case of Ervin & Stevens, Receivers, etc. vs. the State, decided just prior to the decision of the three judge court in the present case.

As we understand the law, the construction given by the highest court of the State as to the meaning of a local statute controls. We further submit that the interpretation given by the Circuit Court of Appeals, Fifth Circuit, in which certiorari was denied by this court fixes the interpretation of this statute and Judge Ervin was bound thereby. We further submit that his construction of the statute is opposed to the construction given by the State Court, the Circuit Court of Appeals of his own Circuit and therefore was laid in error.

It further seems to us that any such construction is refuted by the express language of the statute, which, at the risk of repetition, we again quote:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this chapter, *storing* gasoline and distributing the same or *allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use.*" (Emphasis ours).

Again Section 156 of the 1935 Act defines the term storer as follows:

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same *for any purpose.*" (Emphasis ours).

It was suggested that if the legislature intended this to be purely a tax on storage measured by withdrawals, why did the legislature make any provision for distributors and retail dealers or sellers paying the tax at all?

The tax is imposed upon four different classes, viz: refiners, storers, distributors and retail dealers. These four classes include every possible class handling gasoline from the time of its distillation, to the time of its delivery to the ultimate consumer. The tax is required to be paid but once. If in the successive stages of the distribution of gasoline, the tax is once paid by the refiner, no tax is thereafter due for handling that gasoline from the storer, the distributor or the retail dealer. If not collected from the refiner, then ordinarily the "storer" would pay the tax. And if from any cause, the tax was not collected from the storer, the distributor would be liable for its payment, and finally, if the gasoline reached the retail dealer without the tax having been paid, then the retail dealer must pay the tax. While the tax should be paid but once, the Legislature had the distinct purpose of requiring that it actually be paid and of preventing evasions. If the gasoline was not "refined" in Alabama, then of course the tax could not be imposed on the "refiner." The next class in line is the "storer" explicitly defined by statute, which again for convenience and at the risk of repetition, we quote:

> "The term 'storer' as herein used shall include any person who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner

and withdraws or uses the same for any purpose."

To be a "storer" a person must not only "store" gasoline and withdraw the same, but he must be the one who ships or causes it to be shipped or receives the gasoline into this State.

In Ervin & Stevens v. State of Alabama, 80 Fed. (2nd) 432, decided November 22nd, 1935, the Fifth Circuit Court of Appeals said:

> "We agree with appellee that the statute in defining storer as 'one who ships' used the word 'ships' not in the commercial, but in the physical sense of putting on board of a ship, vessel, or other form of transportation for carriage into the State. The railroad, in bringing the gasoline in over its own line and by use of its own facilities without issuing papers on it, as truly shipped it as if it had consigned it to itself over its own or another line. What the statute in its definition looked to was not the means employed to transport or bring in, but the fact of transportation or bringing in."

And further in the same opinion the test of a storer within the meaning of the statute is stated to be "if he brings gasoline into the State * * * for storage and withdraws it."

It is, therefore, apparent that there may be "distributors" and "retail dealers" in gasoline, who are not "storers" within the meaning of the statute. True, in a broad sense every prson who handles gasoline up to the time it reaches the consumer "stores" the same on account of the very nature of the sub-

stance. As stated in Paragraph XI of the agreed statement of facts (R. 125):

> "Gasoline is a highly volatile and inflammable liquid substance and it is necessary to keep same in closed metal tanks or containers. When gasoline of the seller is stored in storage tanks or containers located in Alabama, before said gasoline can be delivered into storage tanks or containers or in the fuel tanks of vehicles of purchasers thereof, it is necessary to first withdraw such gasoline from storage from the tanks or containers of the seller."

However, to be a "storer" as defined in the statute, a person must be the one who brings the gasoline into Alabama, its first recipient in this State. "Distributors" and "retail dealers" who acquire their gasoline from a supply already in the State of Alabama are not, under the terms of the statute, "Storers". True it would seem that all gasoline in the State would usually either be "refined" here, or be brought into the State and stored, and hence the terms "refiners" and "storers" may have been sufficient to impose a tax with respect to every gallon of gasoline in Alabama. However, it was permissible and prudent for the Legislature to provide in effect that if the tax, from any cause whatever, was not collected from the refiner or storer, then it should be paid by the distributor or the retail dealer. The tax is primarily a tax on storage. It is only when the gasoline has in some manner escaped that tax that the handling of such gasoline is subject to a tax measured by the quantity sold.

The appellee, the Texas Company, confessedly comes within the statutory definition of a "storer"

of all of the gasoline which it handles. All of the gasoline it sells or withdraws from storage in Alabama is manufactured or refined at its refinery located at Port Arthur, Texas, and then shipped into Alabama and stored at its terminal in Mobile, or at one or more of its thirty-six bulk plants located in Alabama. (Paragraph VI of Agreed Statement of Facts, R. 114).

Appellee's learned counsel devoted a great portion of his argument in the District Court to the construction of Schedule 156.2 of the 1935 Act providing as follows:

> "The excise tax imposed by Section 156.1 hereof shall apply to persons as defined in this Chapter, storing gasoline and distributing the same or allowing the same to be withdrawn from storage whether such withdrawals be for sale or other use; provided that '*sellers*' of gasoline and its substitutes paying the tax herein provided *may* pay the same computed and paid on the basis of their sales as hereinafter required and *refiners, storers and distributors shall compute* and *pay* this tax on the basis of their withdrawals or distributions." (Emphasis ours).

The use of the words "may" and "shall" is significant. As a general rule, the word "may" when used in a statute is permissive only, while the word "shall" is imperative. 59 C. J. 1079, Sec. 635; Coleman v. Eutaw, 157 Ala. 327, 47 So. 703.

The statute says storers and distributors "shall compute and pay this tax on the basis of their withdrawals or distributions." Could any command

be expressed in more positive language? Admittedly this plaintiff is a storer.

What class did the legislature have in mind in using the word "seller" in the administrative proviso in Schedule 156.2 of the 1935 Act? It is used in contradistinction to the words "refiners, storers and distributors." "Sellers" are permitted to pay the tax computed on the basis of their sales. "Refiners, storers and distributors" are required to compute and pay the tax on the basis of their withdrawals or distributions. The first section of the 1935 statute contains a number of express definitions. It defines the terms "refiner" and "storer" and "distributor". It does not define the term "seller", but it does define "retail dealer" as a person "who is engaged in the *selling* of gasoline in this State at any place in broken quantities". In at least ten separate sections of the act (156.1, 156.4, 156.5, 156.6, 156.7, 156.8, 156.14 156.15, 156.17, 156.18) the four classes upon whom the tax is imposed are listed in identical language, viz: "*distributor*, *refiner*, *storer*, or *retail dealer*". Those are the four terms expressly defined. The proviso in Schedule 156.2 quoted above uses three of those terms, "*refiners*, *storers* and *distributors*" and a fourth separate class "sellers". We respectfully submit that it is obvious that the word "sellers" does not include those who are "refiners, storers or distributors", but does include "retail dealers", and possibly cover other classes of "sellers" who might not be also "storers".

The legislature may have had in mind that refiners, storers and distributors could easily keep records and compute and pay the tax on the basis of their withdrawals from storage or distributions,

while the "retail dealer" or "seller" would ordinarily make no withdrawals from storage except in broken small and irregular quantities for sale and delivery to the ultimate consumer, and hence his records as to sales would normally be the same as his withdrawals.

Another purpose served by including "sellers" among those subject to the tax is to prevent evasions on the part of any "seller", who claimed not to be a "storer" and who did not acquire the gasoline sold from a "storer". For example, gasoline might be delivered by pipe line from storage plants in other states direct to the consumer in Alabama, in which event it certainly would not be clear that the gasoline had ever been "stored" in Alabama.

Whatever purpose the legislature may have had in using the term "sellers" it did by express mandate require that *"storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."* The appellee owns itself to be a storer and hence, we submit, must compute and pay this tax on the basis of its withdrawals.

Appellee's learned counsel argued at length in the District Court about the administrative construction of the acts, basing their argument mostly upon the liberality of the State Tax Commission in permitting all "sellers" of gasoline, whether also "storers" or not to pay the tax upon the basis of their sales. We submit this was too broad a conception of the word "sellers" but whether so or not, this administrative construction was simply a matter of convenience and cannot avail appellee. Up to the time of the decision of the Panhandle case in 1928, the State Attorney General had held that the tax ap-

plied with respect to gasoline sold the United States, and the plaintiff and other oil companies had so paid the tax. During that period the 1927 Acts were passed and it cannot be argued that the legislature then intended to exclude gasoline sold to the United States from the calculation of the tax. After the decision in the Panhandle case, the State Attorney General did misconceive the extent of the principle there announced, but the error of the Attorney General followed by the taxing officials was more in misunderstanding the limit to which the State's power of taxation extended under the Panhandle decision, than in misconstruing the State statute.

Certainly any administrative construction appearing in this case is not entitled to further consideration after the clear pronouncement of the Circuit Court of Appeals in Pan American Petroleum Corporation v. State of Alabama, 67 F. (2nd) 590, and the unequivocal construction of the statute by the Supreme Court of Alabama in State v. City of Montgomery, 228 Ala. 93, 151 So. 856, and the still later enactment of the 1935 statute with a view especially of meeting a part of the decision in the latter case.

In a very recent case the Alabama Supreme Court declined to follow the construction placed by the State Tax Commission on another section of the license schedule over a long period of years, remarking that such construction was entitled to weight "only when the meaning of the statute is doubtful. Stewart, Clerk, etc. v. Wilson Printing Co., 210 Ala. 624, 99 So. 92; United States v. Healy, 160 U. S. 136, 16 S. Ct. 247, 40 L ed. 369."

State v. Tuscaloosa Building & Loan Association, 161 So. 530, 534.

The meaning of the present statute is not doubtful when it covers in one section the storing of gasoline and its withdrawal *"for any purpose"* and in another section *"whether such withdrawals be for sale or other use."* The appellee admittedly is a "storer" of all of its gasoline (R. 113,115), and we submit, it is subject to the excise tax for such storage, regardless of the use to which the gasoline may afterward be applied.

3. CONSTITUTIONALITY OF THE GASOLINE EXCISE TAX ACT AS APPLIED TO APPELLEE, THE TEXAS COMPANY.

THE GASOLINE EXCISE TAX LEVIED BY THE STATUTES OF ALABAMA ON THE APPELLEE, THE TEXAS COMPANY, BEING A TAX UPON THE PRIVILEGE OF STORING GASOLINE IN ALABAMA MEASURED BY ITS WITHDRAWAL FROM STORAGE, IS NOT, WITH REGARD TO PURCHASE OF GASOLINE IN THE STATE OF ALABAMA BY THE UNITED STATES GOVERNMENT, A TAX UPON THE UNITED STATES GOVERNMENT OR ITS AGENCIES, NOR A TAX WHICH OPERATES IN SUCH MANNER AS TO RETARD, IMPEDE OR BURDEN THE EXERCISE BY THE UNITED STATES OF ITS CONSTITUTIONAL POWERS.

The case principally relied upon by the appellee marks the extreme limit to which the United States Supreme Court has been willing to clothe a

private individual doing business with the Federal government with immunity from State taxation.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857.

Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds vigorously dissented from that decision.

In that case the tax was "one cent per gallon upon the sale of gasoline." The very transaction by which the United States acquired the gasoline was taxed. That case was distinguished by the Fifth Circuit Court of Appeals from the tax here involved in Pan American Petroleum Corporation v. State, 67 F. (2nd) 590, Certiorari denied 291 U. S. 670, because "the tax here is not on the sale but is on the withdrawal of the gasoline".

The tax should be paid but once. Appellee contends that the storage tax is not paid with respect to gasoline sold. What difference does it make whether with respect to gasoline sold the tax is measured by the amount withdrawn from storage, or by the amount sold? The important consideration is the nature of the tax and how it actually operates.

Educational Films Corp. v. Ward, 282 U.S. 379, 387, 75 L. ed. 400, 404.

Under the Alabama statute, what is termed an excise tax is imposed with respect to every gallon of gasoline, refined, stored, distributed or sold. While the tax is called an excise tax, the terms of the excise are so broad as to cover every gallon of gasoline in the State at least as soon as it has come to rest and is not a part of interstate commerce. Insofar as the Constitution of the United States is con-

cerned, it is the same as if the State had imposed upon gasoline a flat advalorem or property tax of six cents on the gallon to be paid but once. Surely the United States on purchasing gasoline could not complain that its vendor had become subject to such an advalorem tax, and hence that the price of the gasoline to it was increased. So closely does this tax resemble a property tax that in the case of State of Alabama v. City of Montgomery, 228 Ala. 93, 151 So. 856, the Alabama Supreme Court found it necessary to distinguish it from a property tax upon the ground that gasoline is an explosive, and hence the privilege of owning and storing it is within the police power.

The Supreme Court of the State of Tennessee in considering the statute upon which the Alabama statute was modeled, also justified that enactment as a valid exercise of the police power because gasoline is intrinsically a dangerous substance, and one of the necessary effects of the tax is to remove the motive for storing it in quantity in that State.

Foster & Creighton Co. v. Graham 154 Tenn. 412; 285 S.W. 570; 47 A. L. R. 976.

The appellee also urges that it makes no difference whether the tax be called a tax on the withdrawal from storage or a tax on the sale, its practical effect is the same—the loss falls on the United States just as directly.

Appellee, we submit, takes too narrow a view of the tax—and herein, we submit, lies an essential distinction between the present statute and the Missippi Act considered in the Panhandle Oil Co. case. That Act was purely and simply a tax on the sale

of gasoline, on the very transaction by which the United States acquired title. Here the tax is more than a sales tax. It covers every possible use to which the gasoline might be put. And certainly in the case of appellee company, the tax had legally attached in favor of the State prior to the application of the gasoline to a sale to the United States.

Appellee's argument must lead to the conclusion that the small independent dealers, the distributors or retailers who do not themselves bring the gasoline into the State, but who purchase it from a storer must include in their purchase price the amount of the tax. If those small independent dealers should thereafter sell some of the gasoline to the United States or its agencies the tax would already have been paid, and such sale would furnish no ground for its recovery. The logical result of appellee's contention would, therefore, be to exclude the small independent dealers from trading with or selling gasoline to the United States, or its agencies, and to give to the large storers a monopoly on the government business.

In Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. ed. 1277, the rule was applied in favor of the Company which sold a motorcycle to the City of Westfield, Massachusetts for use in its police service. The majority opinion by Mr. Justice Van Devanter commented:

> "Under the constitutional principle the exertion of such a function by a State or a State agency has the same immunity from Federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a govern-

mental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus the transaction falls within the class which the United States cannot tax consistently with the constitutional principle."

Again, Mr. Justice Stone dissented with a most able opinion concurred in by Mr. Justice Brandeis. In the course of his dissenting opinion Mr. Justice Stone used language, part of which is quoted in the answer of the defendants in this case:

"In the Panhandle Oil Co. case it was held that this shifting of the burden of a state tax from the seller to the buyer was sufficient to render the tax invalid where the buyer was an agency of the United States, and it was assumed that the burden of the sales tax involved was so inevitably passed on to the buyer as to require this result. With this assumption economists would not, I believe, generally agree. Many hold that whether the burden of any tax paid by the seller is actually passed on to the buyer depends upon considerations so various and complex as to preclude the assumption a priori that any particular tax at any particular time is passed on. In some conditions of the market, the burden remains with the seller, or even may be shifted back from the seller to the producer by the reduction of the producer's price rather than forward to the consumer by an increase of the seller's price."

It may be noted in passing that the Supreme Court of Alabama had made a similar observation in Woco Pep Co. of Montgomery v. City of Montgomery (Ala.) 121 So. 64, 65.

> "We would give emphasis once for all to the principle that whether the tax must be passed on to the consumer or not is not a controlling nor a material inquiry in such cases. Legislative policy should keep in mind such results, but they are not of concern in passing upon the validity of the law. Such inquiry would bring all privilege taxes under review for causes involving complexities not to be considered. It may be said to be common knowledge that tax burdens of all kinds are figured by every business in connection with or as part of its overhead expense, and prices fixed to yield a net profit. The consumer pays the tax."

In this connection it may be noted also that the present contracts between plaintiff and the United States introduced in evidence by plaintiff, were made after the 1935 Act was passed, and after the last opinion of the Alabama Attorney General, and yet the burden of the tax was not passed on to the Federal Government.

The case of Wheeler Lumber B. & S. Co. v. United States, 281 U. S. 572, 74 L. ed. 1047, is well nigh conclusive of this case. There the holding was that a Federal tax of three per cent of the amount paid for transportation of bridge material sold to counties f.o.b. the places of destination was valid, even though the transportation was necessary to effect delivery by the seller:

"The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. United States v. Normile, 239 U. S. 344, 348, 60 L. ed. 319, 321, 36 Sup. Ct. Rep. 122, Ann. Cas. 1918E 34. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale. Cornell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383.

"As the tax is not laid on the sale or in any wise measured by it, the case of Panhandle Oil Co. v. Mississippi 277 U. S. 218, 72 L. ed. 857, 56 A.L.R. 583, 48 Sup. Ct. Rep. 451, referred to in the question and relied on by the plaintiff, is not in point."

In that case before the transportation had been commenced and before the tax fastened, the materials had already been definitely appropriated for sale and delivery to the counties. In the present case, the gasoline was stored, and became subject to a tax to be computed and paid upon its withdrawal from storage before it was known whether that particular gasoline would be sold to the United States or to private individuals.

That case is followed in Trinity Farm Constr. Co. v. Grosjean, 291 U. S. 466, 78 L. ed. 918. In that case there was involved the Louisiana statute which levied a tax of four cents a gallon "on all gasoline or motor fuel sold, used or consumed in the State

of Louisiana for domestic consumption." As construed by the State Supreme Court, the exaction was an excise tax levied upon all gasoline or motor fuel sold, used or consumed in the State. The appellant had contracts with the United States for the construction of levees in Louisiana to control the waters of the Mississippi River and consumed much gasoline in the operation of machinery to do that work. It transported a supply from other States in carload lots, and placed it in a central tank from which distribution was made to other tanks located on its right-of-way in proximity to the machines. It was held that the imposition of the tax on gasoline consumed by this contractor was not an unconstitutional taxation of means or instrumentalities of the Federal Government. The Court said in part:

> "Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc. that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

In the case at bar what difference in principle is there between a State tax on appellee's storage tanks and equipment, and a State tax on the privilege of storing the gasoline? To paraphrase the last

sentence of the opinion just quoted, if the payment of State taxes imposed on the property and operations of appellee affects the Federal government at all, it at most gives rise to a burden which is consequential and remote, and not to one that is necessary, immediate or direct.

The levying of an excise by the States upon various taxable privileges, even though the measure of such tax may include Government instrumentalities has long been recognized.

In Educational Films v. Ward, supra, this court, speaking through Mr. Justice Stone thus discussed the question of constitutional immunity:

> "Under the Constitution the privilege of exercising the corporate franchise is the ligitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this court, since McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other,

Weston v. City Council of Charleston, 2 Pet. 449, 7 L. Ed. 481; Federal Land Bank v. Crossland, 261 U. S. 374; it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

"The precise question now presented was definitely answered in Flint v. Stone Tracy Co., 220 U. S. 107, 162, et. seq., 31 S. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case income from tax exempt municipal bonds. In reaching this conclusion, the court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income.

"Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities

constitutionally immune from any form of direct taxation. A state inheritance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. Plummer v. Coler, 178 U. S. 115, 20 S. Ct. 829, ***. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, and by the United States on a bequest to a municipality. * * * Similerly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. Van Allen v. Assessors, 3 Wall. 573, 583, 18 L. Ed. 229; * * * A tax on net income is not a forbidden tax on exports because it includes receipts from exports in the computation of the income, Peck & Co. v. Lowe, 247 U. S. 165, * * * Nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. United States Glue Co. v. Oak Creek, 247 U. S. 321. * * *"

"It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence, unless the tax-

payer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

By parity of reasoning we submit that an excise on a storer of gasoline, measured by the amount withdrawn from such storage is a legitimate exercise of the state's taxing power, and that it is no objection to the tax because the incidental effect of taxing such privilege may be to increase the price paid by the purchaser subsequent to such storage and withdrawal from storage, and this is no less true if the United States happens to be the purchaser.

In Lash's Products Co. v. United States, 278 U. S. 175, a statute of the United States which imposed on "soft drinks sold by the manufacturer * * * in bottles or other closed containers, a tax equivalent to ten per cent (10%) of the price for which so sold "was construed to be a privilege tax measured by the amount sold, and this Court, in discussing an attempt of a taxpayer to "pass on the tax", said:

> "The phrase 'passed the tax on', is inaccurate as obviously the tax is laid and remains on the manufacturer and on it alone. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all."

This case seems opposed in principle at least to Panhandle v. Mississippi, supra. It would appear that if an excise on a manufacturer measured by sales is not a tax on one purchaser, it would not be on another even though such purchaser be the United States. The original Alabama Gasoline Act of 1923

was construed to levy an excise tax on the dealer or distributor for the privilege of engaging in business, measured by sales (see opinion of Attorney General of March 22, 1923, Exhibit A to answer, R. 91).

It is shown also that acting under this construction, the tax was paid on all sales including those to the United States until the decision in Panhandle v. Mississippi (R. 109).

At the time of this opinion, the tax was a privilege tax on the distributor or dealer measured by sales. In 1927, and by various enactments hereinabove detailed, the tax was made a *privilege* tax on the *storer* for the privilege of storing, measured by the amount stored and withdrawn from storage.

If the purchaser does not pay any tax under a statute levying a privilege tax measured by sales as was held in Lash's Products Company v. United States, supra, it would certainly appear that when a taxable privilege is even further removed and the tax is imposed on the disassociated and independent privilege of storing, it cannot be contended with logic that the purchaser pays the tax. And we submit that logic places the United States in the same category with the State of Alabama and all other purchasers of gasoline who purchased from a licensed storer who has stored and withdrawn such gasoline from storage in the State of Alabama.

In American Airways v. Wallace, 57 Fed. (2nd) 877 which was an effort of an interstate carrier of mail, freight and passengers by plane to enjoin the collection of a like tax under the very much similar statutes of Tennessee above referred to on gasoline purchased by the Company admittedly in interstate commerce, stored on its own property and

used exclusively in fueling planes engaged in carrying United States mail, freight and passengers in interstate commerce, the Court said:

> "It is apparent that not every person who uses his property or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. Metcalf v. Mitchell, 269 U. S. 514, 460 Sup. Ct. 172, 70 L. ed. 384."
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> * * * * *
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> "The statute in question does not impose a tax on the Federal Government, nor an instrumentality of the government, nor is it a burden upon or regulation of a governmental function. It is simply a privilege tax upon engaging in a business within the State, and applies to all persons, firms or corporations doing a like business."

In State v. City of Montgomery, supra, the Alabama Supreme Court said, "that the purpose is to impose the tax on the storage though measured by the amount withdrawn." Let us assume that the Legislature, in its discretion, had made the storage measured *by the amount placed in storage* and payable thereupon. At the time it would be placed in storage no one could tell whether it would ultimately be withdrawn and sold and delivered to the United States. Yet would that uncertainty render the storage of any part of the gasoline not taxable?

We respectfully submit that once it be clearly understood that the tax here in question is a tax up-

on storage and not upon sales, its constitutionality with respect to gasoline withdrawn from storage for any purpose, including sale and delivery to the United States, becomes beyond question.

Respectfully submitted

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This is to certify that a copy of the above and foregoing brief for appellant has been mailed to the Hon. John S. Coleman, Comer Building, Birmingham, Alabama, Counsel for Appellee, with proper postage attached.

This the 16th day of March, 1936.

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